MICHAEL LEE FOOK WAH

v.

MENTERI SUMBER TENAGA MANUSIA, MALAYSIA & ANOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABU MANSOR ALI JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-01-140-95]
11 NOVEMBER 1997

LABOUR LAW: *Industrial Court - Reference by minister - Discretion of minister - Industrial Relations Act 1967, s. 20(3) - Minister's refusal to refer representations to Industrial Court - Judicial review - Whether limited only to minister's decision-making process - Whether judicial review extends to merits of minister's decision - When will courts interfere*

ADMINISTRATIVE LAW: *Exercise of administrative powers - Discretion - Statutory discretion of minister to refer representations on dismissals to Industrial Court - Judicial review - Whether limited only to minister's decision-making process - Whether judicial review extends to merits of minister's decision*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Certiorari, application for - Jurisdiction of High Court - Whether sitting in appellate or supervisory jurisdiction - When will court interfere with exercise of minister's statutory discretion*

This was an appeal from the decision of the High Court dismissing the appellant's application for orders of *certiorari* and *mandamus*. The appellant had applied to the High Court for an order of *certiorari* to quash the decision of the 1st respondent in refusing to refer the appellant's representations to the Industrial Court, and for an order of *mandamus* directing the 1st respondent to exercise his discretion according to law pursuant to s. 20(3) of the Industrial Relations Act 1967 ('the Act').

The appellant had earlier represented to the Director General of Industrial Relations, under s. 20(1) of the Act, that the termination of his services by the 2nd respondent on the ground of redundancy was a mere disguise, and that he had been dismissed without just cause and excuse. The 1st respondent, however, decided that the appellant's representations were not fit to be referred to the Industrial Court pursuant to s. 20(3) of the Act. As a result, the appellant

applied to the High Court for the said orders of *certiorari* and *mandamus* on the following grounds: (i) that the 1st respondent had acted *ultra vires* in the exercise of his statutory discretion by not referring the appellant's representations to the Industrial Court; and (ii) that the 1st respondent had refused or otherwise failed to investigate and evaluate all the facts and circumstances surrounding the termination of the appellant's services by the 2nd respondent.

Held:
Per Shaik Daud Ismail JCA

[1] In hearing an application for an order of *certiorari*, the High Court sits not in its appellate jurisdiction but in its supervisory jurisdiction. The court is, thus, concerned with the decision-making process and not with the decision itself. It should not readily question the administrative decision of a Minister as that is his absolute discretion. The courts will interfere only if the Minister has acted *ultra vires*, unfairly or unjustly in the exercise of his discretion.

[2] The Act does not require the Minister to refer each and every representation to the Industrial Court. Section 20(3) of the Act confers a discretion on him. The courts will interfere only when there is evidence that his discretion has been exercised unlawfully. This discretion is vested in the Minister and not in the courts. Hence, when this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review into a reconsideration on the merits as if it is an appeal.

[3] In the present case, all the relevant materials of the parties in dispute were before the 1st respondent. The 1st respondent's affidavit showed that he had, in coming to his decision, considered and studied all such relevant materials. Therefore, the 1st respondent's decision was fair and just and not frivolous or vexatious.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini merupakan rayuan daripada keputusan Mahkamah Tinggi yang menolak permohonan perayu untuk mendapatkan perintah-perintah *certiorari* dan mandamus. Perayu telah memohon kepada Mahkamah Tinggi untuk mendapatkan perintah *certiorari* bagi membatalkan keputusan responden pertama dalam enggan untuk merujuk representasi-representasi perayu kepada Mahkamah Perindustrian, dan untuk satu perintah mandamus yang mengarah

responden pertama untuk melaksanakan budibicaranya menurut undang-undang selaras dengan s. 20(3) Akta Perhubungan Perindustrian 1967 ('Akta tersebut').

Perayu telah pada awalnya mengemukakan kepada Ketua Pengarah Perhubungan Perindustrian, di bawah s. 20(1) Akta tersebut, bahawa penamatan perkhidmatan beliau oleh responden kedua atas alasan kelebihan kakitangan adalah hanya merupakan helah, dan bahawa beliau telah diberhentikan tanpa alasan dan sebab yang adil. Responden pertama, namun begitu, memutuskan bahawa representasi-representasi perayu tidak sesuai untuk dirujuk kepada Mahkamah perindustrian selaras dengan s. 20(3) Akta tersebut. Akibatnya, perayu telah memohon kepada Mahkamah Tinggi untuk mendapatkan perintah-perintah *certiorari* dan mandamus tersebut atas alasan-alasan yang berikut: (i) bahawa responden pertama telah bertindak *ultra vires* dalam melaksanakan budibicara berkanunnya dengan tidak merujuk representasi-representasi perayu kepada Mahkamah Perindustrian; dan (ii) bahawa responden pertama telah enggan atau sebaliknya gagal untuk menyiasat dan menilai kesemua fakta-fakta dan keadaan-keadaan disekeliling penamatan perkhidmatan perayu oleh responden kedua.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Dalam mendengar satu permohonan untuk mendapatkan perintah *certiorari,* Mahkamah Tinggi bersidang bukannya atas bidangkuasa rayuannya tetapi atas bidangkuasa penyeliaannya. Mahkamah adalah, dengan itu, mengambil berat terhadap proses membuat keputusan dan bukannya dengan keputusan yang dibuat itu. Ianya tidak seharusnya semudah itu mempersoalkan keputusan pentadbiran Menteri kerana itu adalah budibicara mutlaknya. Mahkamah akan mencampuri hanya jika Menteri telah bertindak *ultra vires,* secara tidak adil dalam melaksanakan budibicaranya.

[2] Akta tersebut tidak menghendaki menteri tersebut merujukan setiap satu representasi-representasi kepada Mahkamah Perindustrian. Seksyen 20(3) Akta tersebut meletakkan budibicara ke atasnya. Mahkamah-mahkamah akan mencampuri hanya apabila terdapatnya keterangan bahawa budibicaranya telah dilaksanakan secara tidak sah di sisi undang-undang. Budibicara ini terletakhak pada Menteri dan bukannnya dalam mahkamah-mahkamah. Oleh itu, apabila budibicara ini dicabar, mahkamah mestilah berjaga-jaga dan melawan sebarang pengaruh untuk menukar bidangkuasa mahkamah untuk mengkaji semula kepada suatu pertimbangan semula berdasarkan merit-merit seolah-olah ianya merupakan satu rayuan.

[3] Dalam kes semasa, kesemua bahan-bahan yang relevan kepada pihak-pihak dalam pertikaian terdapat di hadapan responden pertama. Afidavit responden pertama menunjukkan bahawa beliau telah, dalam mencapai keputusannya, mempertimbangkan dan mepelajari kesemua bahan-bahan yang relevan. Dengan itu keputusan responden pertama adalah adil dan bukannya remeh dan menyusahkan.

[Rayuan ditolak.]

Case referred to:
National Union of Hotel Bar & Restaurant Workers v. Minister of Labour [1980] 2 MLJ 189 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), (3)

[Appeal from High Court Malaya, Kuala Lumpur; Originating Motion No: R3-25-29-1994]

For the appellant - Andrew TC Saw (Mazlinda Makhzan with him); M/s Ng Yook Woon, Andrew TC Saw & Co
For the 1st respondent - J Christie (Haliza Aini with him)
For the 2nd respondent - Nalini Pathmanathan (K Sivakumar with him); M/s Skrine & Co

JUDGMENT

Shaik Daud Ismail JCA:

This is an appeal from the decision of the High Court at Kuala Lumpur in dismissing the appellant's application for an order of *certiorari* and *mandamus*. The appellant by an *ex parte* Originating Motion dated 2 April 1994, applied for an order of *certiorari* to remove into the High Court for the purpose of it being quashed the decision of the 1st respondent dated 23 February 1994 and for an order of *mandamus* directing the 1st respondent to exercise his discretion according to law pursuant to s. 20(3) of the Industrial Relations Act 1967 ('the Act').

The facts leading to the appellant making the above application are that the appellant was originally appointed the General Sales Manager of Guinness Malaysia Sdn Bhd on 1 September 1986 and continued to hold that appointment until around November 1989. Sometime around November 1989 there was a merger between Guinness Malaysia Sdn Bhd and another prominent brewery, the Malayan Brewery Bhd. This merger resulted in the formation of Guinness Anchor Bhd, the 2nd respondent herein. After the merger, the appellant continued his employment in the 2nd respondent in the capacity of General Manager Sales.

By a letter dated 18 December 1992 from the Personnel Director of the 2nd respondent, the appellant was informed that his position as General Manager Sales had become redundant and that his services would be terminated with effect from 1 February 1993. As General Manager Sales the appellant received five principal reports from senior managers whose terms with the 2nd respondent, and before that with Guinness and Malayan Brewery, exceeded that of the appellant. The 2nd respondent contends that, after the merger, it became clear that the senior managers could function efficiently and independently without having to report to an intermediate, ie, the appellant, who was in fact below the Sales Director. The Sales Director was the person who makes the decisions after considering the reports from the General Manager Sales. In the light of this the position of the General Manager Sales was therefore merely an intermediary from the managerial positions to the Sales Director. As a result, two years after the merger, the 2nd respondent came to the conclusion that in order to achieve greater efficiency and to give independent control of the managerial positions, it would be more economical to do away with the so called intermediary position, namely the General Manager Sales. In view of this, 2nd respondent declared that the position of General Manager Sales was redundant.

As the appellant's position was made redundant, the 2nd respondent offered a compensation of twenty-one months salary amounting to RM214,167 and in addition the appellant was offered the option to purchase the company vehicle which he was then using, valued at RM88,000, at 20% of the discounted price. This offer was made to appellant for his six years and five months term of service with 2nd respondent. In addition to this the 2nd respondent was also prepared to offer an additional six months salary. All these offers were out-rightly rejected by the appellant. The appellant contends that the reasons given for the disestablishment of his position was untenable and that he was victimised and made a subject of unfair labour practice, and was in fact dismissed without just cause or excuse under the guise of a restructure exercise.

As a result of the termination of his services, the appellant made representations to the Director General of Industrial Relations (DG) under s. 20(1) of the Act. The DG in his effort to effect a conciliation caused an *inter partes* meeting on 22 February 1993 between the appellant and the 2nd respondent. Apart from this *inter partes* meeting the DG also met separately representatives of the 2nd respondent. All these efforts were fruitless.

Then by a letter dated 23 February 1993, the appellant was informed that the 1st respondent having considered the representation, decided under s. 20(3) of the Act that the appellant's complaint was not fit to be referred to the Industrial Court.

In his application to the High Court the appellant set out two grounds namely:

1. The 1st respondent had acted *ultra vires* and/or in excess of and/or without jurisdiction and/or abused his discretion in exercising his statutory discretion by not referring the applicant's matter to the Industrial Court.

2. The 1st respondent had refused or otherwise failed to investigate and evaluate all the facts and circumstances surrounding the applicant's dismissal from employment by the 2nd respondent.

First and foremost it must be emphasised that in an application for *certiorari*, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not on the decision itself. The court should not readily question the administrative decision of the 1st respondent as that is his absolute discretion. If the 1st respondent had acted *ultra vires*, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

It was argued before us that the 1st respondent did not consider the complaints by the appellant and the background of the case. With respect, we are unable to agree with this argument. The appellant in his affidavit affirmed on 1 April 1994, himself averred that "all the relevant facts and evidence in support of every issue raised in my complaint ... had been tendered to the 1st respondent." It is not disputed that both sides have presented their case to the DG and the 1st respondent, and the same material is before the court. This shows that all the materials necessary in respect of the appellant's complaint, were before the 1st respondent. The 1st respondent in his affidavit affirmed on 10 January 1995, averred that he had considered all relevant materials including the report of the DG on efforts at conciliation. In para 5 of the said affidavit the 1st respondent concluded thus:

> Saya mengesahkan bahawa semua fakta-fakta yang telah dibangkitkan oleh pemohon dan responden kedua didalam mesyuarat-mesyuarat runding damai tersebut telah dipertimbangkan oleh saya dengan teliti sebelum saya membuat keputusan saya di bawah s. 20(3) Akta Perhubungan Perusahaan 1967.

From this, it seems clear to us, that the decision of the 1st respondent not to refer to the Industrial Court, was made after a thorough study of all relevant material and was a fair and just decision. It cannot, therefore, be said that it was a frivolous or vexatious decision. It cannot also be said that the decision was unjust or unfair.

It was also argued before us that when all the materials are before the 1st respondent it was his duty to refer the complaint to the Industrial Court and not usurp the function of that court by making his own decision thereon.

With respect, this line of argument seems to suggest that the 1st respondent is required to refer every complaint referred to him, to the Industrial Court, irrespective of whether it is a fit and proper case to do so. The law does not require the 1st respondent to do this, otherwise the position of the 1st respondent *vis-a-vis* the Act, would be that of an intermediary or a mere postman. It is not a mechanical exercise for the 1st respondent in every case to refer to the Industrial Court. Section 20(3) provides that " ... The Minister may, if he thinks fit, refer the representation to the court for an award."

From this it can be seen that s. 20(3) of the Act confers a discretion on the 1st respondent as to whether or not to refer any particular representation. Whether a reference is made must, therefore, depends on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully.

In this respect we cannot do better than refer to the case of *National Union of Hotel Bar & Restaurant Workers v. Minister of Labour* [1980] 2 MLJ 189. In that case five hotel workers, who were union members, and one other worker (a non-union member) were found gambling in the hotel premises. An inquiry was held and they were all dismissed. The non-union member made representations to the Director General for Industrial Relations. He denied that he was gambling. The Minister thereupon referred his case to the Industrial Court as an industrial dispute. The appellants on behalf of the five union members then reported the trade dispute arising from their dismissal to the Minister with a request that it be referred to the Industrial Court. Inquiries were made which revealed that the representatives of the appellants admitted that the five union workers were gambling in the hotel premises. The Minister refused to refer the case to the Industrial Court and the appellants applied for an order of *certiorari* to quash the decision of the Minister. It was argued that the Minister in refusing to refer the dispute to the Industrial Court, had failed to take into consideration a similar case (in respect of the non-union member) which was referred to the Industrial Court. It was further argued that the Minister had, therefore exercised his discretion wrongfully and in a manner not in accord with the policy and scheme of the Act. The application was refused in the High Court and on appeal to the then Federal Court, the appeal was dismissed. The court, *inter alia*, held that where the Minister is satisfied that it is expedient so to do, he may of his own motion refer any trade dispute to the Industrial Court. This subjective formulation is sufficient to show that the Minister has a discretion to determine the desirability or otherwise of a

particular course of action within the scope of the discretionary power. The exercise of this discretion is vested in the Minister, not in the courts. When this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration on the merits as if it is an appeal.

We hold that, the very fact that the Minister did not refer per se any particular trade dispute, does not necessarily mean that the Minister has abused his discretion. It is for him to be satisfied that it is a fit and proper case to refer to the Industrial Court. An exercise of a discretion does not always mean that it should be exercised only in a positive manner. A negative act, as in the present case, is equally an exercise of a discretion, provided the Minister had considered every aspect of the case. On the facts and circumstances of the present case, we are satisfied that the Minister had exercised his discretion in a manner which was in accord with the scheme and intention of the Act, and as such the court should not interfere.

The appeal is dismissed with costs. We order the deposit to go to the respondent to account of costs.

Reported by Alex KC Lee